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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 288

SWISS NATIONAL INSURANCE COMPANY, LTD., A CORPORATION OF BASLE, SWITZERLAND, PETITIONER,

v.

LEO T. CROWLEY, AS ALIEN PROPERTY CUSTODIAN, AND W. A. JULIAN, AS TREASURER OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court of the United States for the District of Columbia granting defendants' motion for judgment on their counterclaim is not reported but will be found at R. 148. The affirming opinion of the United States Court of Appeals for the District of Columbia is reported at 136 F. (2d) 265 and will be found at R. 185. The issues raised by the complaint were not

presented to the trial court or the Court of Appeals and are not here involved.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on May 24, 1943 (R. 189). The petition for a writ of certiorari was filed on August 24, 1943. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In 1921 the petitioner filed a suit under Section 9 of the Trading with the Enemy Act for the return of all its assets seized as enemy property by the Alien Property Custodian in 1918. This Court in 1925 decided that the petitioner was an enemy and not entitled to any return (267 U. S. 42). In 1924 the petitioner filed a notice of claim under Section 9 for return of profits made while operating under license, a claim embraced within that asserted in the litigation, and the President, acting upon a recommendation of the Attorney General in 1925 in ignorance of the decision of this Court, ordered the return of the profits, which were thereupon paid to the petitioner. In 1931 the petitioner instituted this, a second suit under Section 9 for a further return on its claim under the Settlement of War Claims Act of 1928, and the Government counterclaimed for restitution of 20%

of the funds illegally returned in contravention of the final decision of this Court in the first suit.

The case presents the following question:

Whether in a second suit by an enemy under Section 9 of the Trading with the Enemy Act for the return of additional moneys, the United States can recover on a counterclaim moneys previously returned by an order of the President under Section 9 which disregarded a final judgment in the first suit and was induced by mistake of law and fact.

STATUTE INVOLVED

The applicable portions of the Trading with the Enemy Act, as amended, are set forth in the Appendix, pp. 15–18.

STATEMENT

The petitioner, an insurance company incorporated under the laws of Switzerland, opened a branch office in New York in 1910 (R. 54). After our entry into World War I on April 6, 1917, the Company continued to do business (R. 55). On October 6, 1917, the Trading with the Enemy Act (40 Stat. 411) became a law and, as the petitioner carried on business in Germany, it was an "enemy" as defined in the Act. Nevertheless, it was permitted to operate under licenses until November 18, 1918, when, after revocation of its license, all its property and assets in the United States were duly demanded and seized by the Alien Property Custodian. (R. 54–55.)

On November 28, 1921, the petitioner instituted an action under Section 9 of the Trading with the Enemy Act in the then Supreme Court of the District of Columbia against the Alien Property Custodian and the Treasurer of the United States (*Swiss National Insurance Company* v. *Miller*), praying for the return of *all* its seized property, including "all income and accruals and such other further property as may be in the hands of the Alien Property Custodian or the Treasurer of the United States" (R. 166–168). Upon defendants' motion, that action was dismissed (R. 171), and the trial court's decree was affirmed by the Court of Appeals of the District of Columbia (289 Fed. 571; R. 171) and by this Court (267 U. S. 42; R. 177). It was thus judicially determined that the petitioner was an enemy, and was not entitled to the return of any of its property.

On March 3, 1924, while the case was pending in this Court, the petitioner filed notice of claim with the Alien Property Custodian under Section 9 for the return of the profits earned while operating under the licenses (R. 55). These profits were an integral part of the property seized, and their return was included in the relief sought in the suit then pending. This Court affirmed the decision of the Court of Appeals on February 2, 1925 (R. 177). Nevertheless, on June 13, 1925, the Attorney General recommended to the President the allowance of the claim, stating, *inter alia* (R. 66, 67):

> * * * suit has been instituted by this company petitioning the release of all of its property on the ground that it was a corporation of Switzerland, which suit is *now pending* in the Supreme Court of the United States, * * * [Emphasis supplied.]

No mention was made of the prior decisions of any of the three courts.

The letter also stated that there was "pending litigation in this case" and recommended the securing of a release discharging the United States from further liability for the profits upon payment of the claim (R. 72). The President approved the recommendation on June 15, 1925 (R. 66), and there was returned to the claimant the sum of $331,612.10 plus interest in the amount of $87,-618.87, representing all the profits earned while operating during the period of the licenses (R. 56).

On March 10, 1928, the Settlement of War Claims Act (45 Stat. 254, 270) was enacted. It amended the Trading with the Enemy Act by providing in effect that former enemy corporations, substantially owned by Germans, could receive back 80% of their seized property, if they signed consents to the retention by the Custodian of 20%. The petitioner filed such a claim and consent and 80% of the residue of its property was returned (R. 58).

The complaint in the present action was filed on September 2, 1931 (R. 2), and sought an accounting of various sums reserved by the Custodian. With their answer, the respondents filed

a counterclaim praying restitution of 20% of the profits returned by the allowance of June 15, 1925, together with various items of income (R. 12–24). The theory of the counterclaim was that though the entire return to the petitioner in 1925 was erroneous and illegal, the petitioner would have been entitled to the return of 80% of the profits after March 10, 1928, by the Settlement of War Claims Act and therefore restitution of only 20% of the profits was sought. The issues raised by the counterclaim (R. 12) and the reply thereto (R. 42) were submitted on a stipulation of facts (R. 53–145) upon which the trial court granted defendants' motion for judgment on the pleadings (R. 146, 151).

ARGUMENT

Petitioner does not deny that the decision of this Court in *Swiss National Insurance Co.* v. *Miller,* 267 U. S. 42, in 1925 was *res judicata* as to its right to the return of the amounts in question here,[1] or that the President's approval of the

[1] The complaint in the case decided in 1925 expressly sought the return of all petitioner's property in the hands of the Alien Property Custodian, with the "increase thereof" and the "income therefrom," and thus reached the funds subsequently recovered under the President's order. Although it does not appear that petitioner made in that case the argument presented to the Attorney General and to the President, no reason appears why it could not have done so. It is well established that a decision in an action between the same parties on the same claim or demand is binding "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other

payment to it, in ignorance of that decision, was based upon a mistake of law. Its contentions are (1) that the President's allowance of its claim is absolutely final, not to be set aside by the courts even on a showing of mistake, and (2) that, in any event, it is entitled in equity and good conscience to keep the money inasmuch as the decisions of this Court holding that a seizure by the Alien Property Custodian completely divests enemies of all interest in the property seized were erroneous and should be overruled.

1. It is settled doctrine that, whatever be the rule as between private individuals, the United States is entitled to recover public funds paid out under a mistake of law or of fact. *United States* v. *Burchard,* 125 U. S. 176; *United States* v. *Barlow,* 132 U. S. 271, 281–282; *Wisconsin Central Railroad* v. *United States,* 164 U. S. 190, 211–212; *United States* v. *Wurts,* 303 U. S. 414, 415; *Heidt* v. *United States,* 56 F. (2d) 559 (C. C. A. 5), certiorari denied, 287 U. S. 601; *United States* v. *Bentley,* 107 F. (2d) 382 (C. C. A. 2); Restatement of Restitution, Sec. 46. The lower federal courts have uniformly held that this prin-

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admissible matter which might have been offered for that purpose." *Cromwell* v. *County of Sac*, 94 U. S. 351, 352–353; *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 396; *Southern Pacific R. Co.* v. *United States*, 168 U. S. 1, 48; *Myers* v. *International Trust Company*, 263 U. S. 64, 70–71; *United States* v. *Moser*, 266 U. S. 236, 241; *Jackson* v. *Irving Trust Co.*, 311 U. S. 494, 503.

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ciple applies to property returned by the Alien Property Custodian. *Cummings* v. *Societe Suisse,* 85 F. (2d) 287, 99 F. (2d) 387 (App. D. C.), certiorari denied, 306 U. S. 631; *Isenberg* v. *Biddle,* 125 F. (2d) 741 (App. D. C.); *United States* v. *Rodiek,* 117 F. (2d) 588 (C. C. A. 2), affirmed, by an equally divided court, 315 U. S. 783; *United States* v. *W. A. Pflueger,* Civil Action No. 2356, N. D. Ill., decided February 4, 1941; *United States* v. *H. H. Pflueger,* Civil Action No. 21726-R., N. D. Cal., decided September 27, 1941.

The petitioner has suggested no valid reason why this general principle should not apply. The Trading with the Enemy Act does not give to the President's determination any greater finality than would normally be accorded the decisions of any other official on questions of disbursement. The purpose of the provision allowing the payment of claims upon a determination by the President or his delegate of the claimant's status and preseizure ownership of the property was to make it unnecessary for all claimants to resort to the courts to recover their property. The achievement of that purpose did not require that the administrative determination, if favorable to the claimant, should be forever thereafter binding upon the Government, even though it be subsequently found to have been based on a mistake of law or fact or even fraud and thus to sanction recovery specifically forbidden by the Congress. In the absence of any indication to the contrary

in the statute there would seem to be no more reason for ascribing finality to an erroneous Presidential determination based on a mistake of law that a claim under Section 9 should be paid than to an erroneous determination by the Postmaster General based upon a mistake of law as to the pay for carrying the mails (*Wisconsin Central Railroad* v. *United States,* 164 U. S. 190) or to an erroneous determination by the Commissioner of Internal Revenue based upon a mistake of law that a refund of federal taxes should be paid. *Eg., United States* v. *Wurts,* 303 U. S. 414.

The Act contains neither express provision nor any statutory language from which an intention to make the Presidential determination final may be inferred. To the contrary, the express reservation to dissatisfied persons of a right to institute an independent action in the courts, and the power given the President to delegate authority to make the determination (Section 5 (a))[2] forcibly indicate that Congress intended the President's order to be, not a quasi judicial determination, but comparable to the act of a disbursing officer exercising executive functions.

[2] The power to make the determination was frequently delegated by the President to such persons as the Attorney General, the Alien Property Custodian, the Managing Director of the Office of the Alien Property Custodian, the Assistant Managing Director, the General Counsel of the Alien Property Custodian, and the Director of Finance and Accounts. See, for examples, Executive Orders 3281 of June 11, 1920; 4572–A of January 27, 1927; 4862 of April 23, 1928; 5113–A of May 14, 1929; and 6018 of February 7, 1933.

Cf. *United States* v. *Minor,* 114 U. S. 233, 243. So considered, the order is plainly not conclusive on the courts.

From the existence of a provision for judicial review when the President disallows a claim and the absence of a statutory remedy when a claim is allowed, the petitioner argues that Congress intended that an allowance should be final. No such inference may be drawn, for no statutory provision is necessary to permit the United States to sue to recover public moneys erroneously paid out. *Wisconsin Central Railroad* v. *United States,* 164 U. S. 190, 205; *United States* v. *Wurts,* 303 U. S. 414, 415. Nor does the provision of Section 9 (c) quoted by the petitioner (Brief, p. 12) lend support to its view. It seems obvious that even without an express bestowal of the power to determine facts both the President and the court would have possessed the power by implication from the power to make a decision. The petitioner also mistakes the import of the language of the proviso of Section 12. The purpose of this proviso, apparently, was to make it plain that money or property held by the Custodian or the Treasurer should be released from the directions as to administration contained in Sections 6 and 12 upon the issuance of an order by the President or by the court directing the return of the property to a claimant. The proviso is not indicative, as the petitioner urges, that Congress intended a Presidential order to be as

final and conclusive as a judicial decree in all respects.

Furthermore, even if we assume that a presidential allowance under Section 9 might be entitled to finality in some circumstances, the President's determination is not conclusive in the circumstances of this case. The only purpose for giving the presidential determination finality would be "to put the controversy at rest." Where the claimant invites reexamination of the question of the amount of the allowance, there is no reason to deny the Government the right to litigate every question relating to the original claim. The courts accordingly have permitted the Government to counterclaim for an allowance paid under mistake where the claimant, having received the allowance pursuant to a determination, sued to recover an additional sum. *McElrath* v. *United States,* 102 U. S. 426, 441; *Cummings* v. *Societe Suisse,* 85 F. (2d) 287, 99 F. (2d) 387 (App. D. C.), certiorari denied, 306 U. S. 631; *United States* v. *Rodiek,* 117 F. (2d) 588 (C. C. A. 2), affirmed by an equally divided court, 315 U. S. 783.

The Government's position in the present case is much stronger than in the *Rodiek* case and other cases cited. In those cases the court reviewing the President's allowance of a claim was required to determine for itself *ab initio* whether the President's decision was correct as a matter of law. In none was there a situation comparable to that at bar, in which the case had been resolved

by this Court prior to the President's allowance of the claim, and in which the President, acting in ignorance of the decision, permitted the return of property to a claimant who had previously been held ineligible to receive it. The facts in this case are unusual, to say the least, and they should not, and we believe will not, recur frequently in the future.

2. Petitioner urges that even if the President's allowance of its claim is not conclusive in the present circumstances, it is nevertheless entitled to keep the money because it suffered no unjust enrichment by the receipt of property equitably owned by it and to which it would ultimately be entitled. This argument can succeed only if the seizure by the Alien Property Custodian did not give the United States absolute title to the property but left an equitable interest in the original owner. Petitioner concedes that its argument requires the overruling of the cases in which this Court has repeatedly held that the title acquired by the United States was absolute. *United States* v. *Chemical Foundation,* 272 U. S. 1; *Cummings* v. *Deutsche Bank,* 300 U. S. 115; *Woodson* v. *Deutsche, etc., Vormals,* 292 U. S. 449, 454; *Commercial Trust Co.* v. *Miller,* 262 U. S. 51, 56.[3]

[3] See also *Cummings* v. *Hardee*, 102 F. (2d) 622, 627 (App. D. C.), certiorari denied, 307 U. S. 637; *Munich Reinsurance Co.* v. *First Reinsurance Co.*, 300 Fed. 345 (D. Conn.), affd., 6 F. (2d) 742 (C. C. A. 2), appeal dismissed, 273 U. S.

We do not think reconsideration by this Court of its prior decisions under the Trading with the Enemy Act is called for. All property, with the exception of a few millions in value, seized during World War I has been administered and disposed of in conformance with the interpretation of the Act which has prevailed up to this time.[4]

Nor is a case involving property seized in the last war a proper vehicle for determining the status of property seized during the present war. The Secretary of the Treasury and the present Alien Property Custodian are operating primarily under Title III of the First War Powers Act, 1941, 55 Stat. 838, 839, amending Section 5 (b) of the Trading with the Enemy Act (50 U. S. C. App. Supp I, Sec. 616). See Executive Order 9193 of July 6, 1942 (7 F. R. 5205). The present Alien Property Custodian is not now seizing property of enemies or allies of enemies under Section 7 (c) of the old Trading with the Enemy Act but is "vesting" property of "foreign nationals" under Section 5 (b) as amended. The questions which will arise under the Act as amended are not

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666; *Chemische Fabrik, etc.* v. *Tait*, 64 F. (2d) 295 (C. C. A. 4), certiorari denied, 290 U. S. 648; *Deutsch-Australische, etc.* v. *United States*, 59 C. Cls. 450, appeal dismissed, 277 U. S. 610; *Balkan Nat. Ins. Co.* v. *Commissioner of Internal Revenue*, 101 F. (2d) 75, 77 (C. C. A. 2).

[4] Since the beginning of World War II the return of property seized in World War I has been held in abeyance.

identical with those raised by the older statute, and it will be time enough for this Court to determine whether such mistakes as that here involved can be rectified under the present system when, and if, they arise.

CONCLUSION

The decision below is correct. It does not conflict with, but on the contrary is supported by, the other decisions on the point. The question as raised here presents no issue important enough to warrant further review. We therefore respectfully submit that the petition should be denied.

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